Supreme Court, U. S.
FILED
MAY 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 79-1867

LEWIS E. JONES,

Petitioner

VS.

CLIFFORD ALEXANDER,
SECRETARY OF THE ARMY,

Respondent

APPLICATION FOR WRIT OF CERTIORARI

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Jerry D. Sanders
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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

LEWIS E. JONES, :

Petitioner :

CIVIL ACTION

vs. :

CLIFFORD ALEXANDER, :
SECRETARY OF THE ARMY,

:

Respondent

APPLICATION FOR WRIT OF CERTIORARI

I. OPINIONS BELOW

The previous opinion in this case has been reported and is found at 609 F.2d 778 (5th Cir., 1980).

II. STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on January 10, 1980, and Motion for Rehearing was denied of February 14, 1980, copies thereof being appended to this Petition.

The decision of the United States Court of Appeals for the District of

Columbia Circuit was made on February 26, 1979, as amended April 9, 1979, which is reported at 603 F.2d 914 (DC Cir. 1979). The jurisdiction of this court is invoked under 28 U.S.C. 1245 (1).

III. QUESTIONS PRESENTED

The principal question presented for review is consideration of the division of the District of Columbia Court of Appeals and the Court of Appeals for the Fifth Circuit with regard to the same issues presented in this case.

The secondary issue after resolution of the division of the circuits is whether a Plaintiff so situate as the present one is entitled to relief as a matter of law under a set of facts showing that a military department has released him from active duty by procedures that were not prescribed or authorized by statute or regulation.

IV. STATEMENT OF THE CASE

The Petitioner, LEWIS E. JONES, filed his Complaint against the Respondent, THE SECRETARY OF THE ARMY, seeking declaratory, mandatory and injunctive relief. After proceedings in the Court below summary judgment was granted to the Respondent, which was affirmed on appeal to the United States Court of Appeals for the Fifth Circuit.

The Petitioner is a warrant officer in the United States Army Reserves. On February 7, 1977, he was released from active duty pursuant to special orders.

In May, 1975, the Respondent convened a Promotion Selection Board to consider the appellant for temporary promotion to the next higher grade. In February, 1976, the Appellee convened another selection board for the same purpose. Both the 1975 and 1976 Boards considered the Appellant

for promotion, but neither Board selected the Appellant for promotion to the next higher grade.

The 1975 Selection Board contained no reserve officers among its membership. As a result of applications made by certain other reserve officers, the Army Board for the Correction of Military Records (ABCMR) convened on December 10, 1975, to consider alleged defects in selection board proceedings. As a result of the investigation by the ABCMR, certain findings and recommendations were adopted. The ABCMR found, inter alia, that the 1975 Selection Board had no reserve officers among its membership, that such was the requirement of the law, and recommended that a new Selection Board be convened for that year, that the records of all officers non-selected for promotion by that Board be reconstituted as of the date of the meet-

ing of the previous board, that a reconvened Board reconsider each previously non-selected officer for promotion and report to the ABCMR the names of those officers selected for promotion and those officers again non-selected for promotion for "... such administrative action as may be deemed appropriate."

On January 5, 1975, the Deputy Assistant Secretary of Defense recommended that the Respondent accept the recommendations of the ABCMR. On January 7, 1976, the Respondent approved the findings, conclusions, and recommendations of the ABCMR and directed that those recommendations be adopted. Pursuant to that directive, a new selection board for the year 1975 was reconvened to consider the Petition for temporary promotion to the next higher grade. This reconstituted selection board ("Relook" board) convened on June 8, 1976,

and adjourned on June 20, 1976.

Sometime prior to September 22, 1976, the Petitioner made his application to the ABCMR to correct his military record. The Petitioner's contention was that his non-selection by the original 1975 selection board was void for the reason that the 1975 Board contained no Reserve Officers among its membership, as required by law. On September 22, 1976, the ABCMR convened, and recommended that the Petitioner's application be denied. On November 1, 1976, the Respondent approved the recommendation of the ABCMR with respect to the Petitioner's application and denied his application.

On October 4, 1976, the Respondent ordered that the Petitioner be notified that he would be released from active duty for the reason that he had twice been non-selected for promotion by promotion

selection boards. On November 10, 1976, the Petitioner received notice that he had been non-selected for promotion by two consecutive selection boards, and would be released from active duty. Pursuant to Army Regulation 635-100, the Respondent ordered the Petitioner released from active duty on February 7, 1977. The Petitioner was released pursuant to that order.

V. REASONS FOR GRANTING THE WRIT

The decision below in the Fifth Circuit Court of Appeals should be reviewed because it conflicts with the prior decision in the Court of Appeals for the District of Columbia Circuit, being the case of Dilley v. Alexander, 603 F.2d 914, (DC Cir 1979).

All points raised in the appeal of Petitioner were raised in the Dilley case, supra. The Court of Appeals for the

District of Columbia specifically found "that the Corrections Board's treatment of appellants' claims were contrary to law and that the secretary's actions thereon were arbitrary and capricious." This Circuit further ordered the Appellants reinstated to active duty and to be considered again by two Promotion Selection Boards constituted in accordance with applicable statutes and regulations.

In the instant case the Fifth Circuit Court of Appeals found "that the secretary did not abuse his power under Section 1552" and "we cannot say the secretary acted arbitrary or capriciously in exercising this power and formulating the Relook Board as a remedy." Jones v. Alexander, 609 F.2d 778, at 783 (5th Cir. 1980).

Clearly the two circuits are divided on their opinion with regard to the actions of the Secretary of the Army in

these matters. Under these circumstances Certiorari should be granted to resolve the conflicts. Rogers v. Quan, 357 U.S. 193, 78 S.Ct. 1076 (1958), U.S. v. Price, 361 U.S. 308, 80 S.Ct. 326 (1960), Mitchell v. Robert De Mario Jewelry, Inc., 361 U.S. 388, 80 S.Ct. 332 (1960), Waterman SS Corp. v. U.S., 381 U.S. 252, 85 S.Ct. 1389 (1965).

It is the contention of the Petitioner in this matter that the actions of the Respondent's Promotion Selection Boards were not valid as a matter of law.

As a general proposition, executive agencies and departments are governed by the statutes creating them, and by the regulations adopted by them. Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559 (1944), United Steelworkers v. N.L.R.B., 390 F.2d 846 (DC, 1968), Garvey v. Freeman, 397 F.2d 600 (10th Cir., 1968). Not only will

agencies and departments "... be required to follow congressional mandate..." (390 F.2d at 846) but "... the power of those agencies is circumscribed by the authority granted." (64 S.Ct. 571). Besides being limited by statute, an administrative agency is bound by its regulations. "To be sure, an administrative agency is bound not only by the precepts of its governing statute but also by those incorporated into its own regulations..." Nader v. N.R.C., 513 F.2d 1045, 1051 (D.C., 1975). The parameters created by the governing statutes and regulations are mandatory. The administrative body may take no action not permitted by the creating authority, and "... no amount of need alone can create a federal agency power if Congress has not expressly or impliedly granted it." La. Power and Light Co. v. United Gas Pipeline Co.,

456 F.2d 326, 335 (5th Cir. 1972). The case of United States v. Brown, 206 U.S. 240, 27 S.Ct. 620 (1907) is particularly instructive. There, the Appellee was a volunteer officer who had been court martialed. The applicable statute stated that "officers of the Regular Army shall not be competent to sit on courts-martial..." The officer's contention was that the sentence imposed was void for the reason that the president of the Court was an officer in the Regular Army. The United States contended that the sentence was valid for the reason that the Regular Army officer was serving in the militia. The Court, through Justice Holmes, held:

> "This argument would have great force when it was required as formerly, only that courts-martial for the trial of militia officers 'should be composed entirely of militia officers.' Acts of April 10, 1806, Chap. 20, Art. 97, 2 Stat. at L. 358, 371. If there was a settled practice of treating

> these words as satisfied if the members of the Court were militia officers, whether they also held commissions in the Regular Army or not, we well might hesitate to overthrow it. But when the express prohibition contained in Article 77 was adopted by the Revised Statutes (U.S. Comp. Stat. 1901, p. 959), it made the former construction no longer possible. The words of the statute are peremptory and must be obeyed. We do not apprehend any servious consequences, in view of the date of the change. But, whatever the consequences, we must accept the plain meaning of plain words. It follows that the proceedings of the court were void and that it is not necessary to mention or consider other objections that wereurged." 27 S.Ct. at 621.

Given this general proposition, that executive departments and agencies must comply with the parameters expressed in statutes and regulations governing them, are aggrieved parties entitled to relief? Again, as a general proposition, the Courts will intervene if the agency of department does not comply with the applicable statutes. Morton v. Ruiz, 415

U.S. 199, 94 S.Ct. 1055 (1974), Edwins' Inc. v. United States, 501 F.2d 675 (7th Cir. 1974). This rule applies to military departments as well as other executive agencies. "While the courts are reluctant to interfere in military affairs, the Navy is bound by its own validly promulgated regulations, and the district courts are free to entertain suits by servicemen requesting compliance with such rules." Nixon v. Secretary of Navy, 422 F.2d 934, 937 (5th Cir., 1970), Bluth v. Land, 435 F.2d 1065 (4th Cir. 1971, Bray v. United States, 515 F.2d 1383 (Ct.Cl. 1975).

The Respondent had conceded that the original 1975 Promotion Board considering the appellant for promotion had no reserve membership and that it was not impractical to include reserve officers. By the Respondent's own admission the results of this Board were invalid. The Appellant

was released from Active Duty pursuant to the provisions of Army Regulations 635-100, para. 3-65.

> "Except as indicated below, the following officers will be relieved from active duty on the 90th day after receipt of involuntary release notification unless voluntary earlier release is requested-- ... (3) AUS Warrant Officers who fail a second time to be considered fully qualified, under AR 624-100, for promotion to temporary AUS grade of Chief Warrant Officer, W-3 or W-4, provided 9 months or more elapse between adjournment dates of selection boards."
> AR 635-100, para. 3-65.

The Petitioner was originally notified that he would be released because of non-selection by the original 1975 Board. However, recognizing that the results of that Board were invalid because the Board membership contained no reserve officers, the Respondent convened the 1975 "Relook" Board. The Petitioner was then released from active duty because of non-selection by the 1975 "Relook" Board, and the 1976

Board. The Petitioner submits that the results of the 1975 "Relook" Board are invalid, and that he was wrongfully released from active duty.

VI. CONCLUSION

The Courts of Appeal for the District of Columbia Circuit and the Fifth Circuit are divided in their opinion in the treatment of officers who are released from active duty due to the improper convening of selection boards. Due to this conflict it is respectfully requested that the United States Supreme Court accept Certiorari to resolve the issue. It is fundamentally unfair that litigants in similar situations be treated differently depending upon the situs of the forum to which the Complaint was filed.

It is the request of the Petitioner that Certiorari be accepted in this matter in order that review of the Fifth Circuit

Court of Appeals decision be had and that it be directed to follow the findings and decision of the Court of Appeals for the District of Columbia Circuit in Dilley v. Alexander, supra., it being the prior decision on these matters.

Respectfully submitted this 10th day of May, 1980.

ARAGUEL, SANDERS, CARTER & SWAIN, P. C.
By: Jerry D. Sanders
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Jerry D. Sanders, Attorney for the Petitioner, do hereby certify that I have served the Respondent with three copies of the foregoing Application for Writ of Certiorari by mailing the same in a properly addressed envelope with proper postage affixed thereon to the Honorable Gregory Leonard, Assistant United States Attorney, P. O. Drawer "U", Macon, Georgia, 31201, Attorney for the Respondent and the Solicitor General, Department of Justice, Washington, D. C., 20530.

Dated this the 10th day of May, 1980.

ARAGUAL, SANDERS, CARTER & SWAIN, P. C.
By: Jerry D. Sanders
Attorney for Petitioner

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Decided: January 10, 1980

77-2337 JONES V. ALEXANDER

Army reserve warrant officer who had been passed over for promotion by two Army Selection Boards sued to prevent his release from active duty and for correction of his military records. The United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, rendered summary judgment for the Secretary of the Army and appeal was taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) One of the two selection boards which passed plaintiff over was improperly constituted because no reserve officers were included in its membership; (2) such defect did not ren-

der the board's action a nullity; and (3) Secretary could properly remedy the compositional flaw by convening a relook board with reserve officer members, which board was to examine applications as they were reconstituted to appear as they had at time of proceedings before the defectively constituted board, with the relook board to use the same criteria as used by the original board.

AFFIRMED.

FAY, Circuit Judge:

Lewis Jones was passed over for promotion by two Army Selection Boards. He filed this action to prevent his release from active duty and for correction of his military records. The District Court denied an injunction and Jones was released. The Court then granted the Secretary of the Army's Motion for Summary Judgment, and Jones appeals. The core

issues are whether the Secretary can remedy an improperly constituted promotion board and, if so, whether the Army has taken proper steps to correct the error here. We affirm the grant of summary judgment.

I. FACTS AND PROCEEDINGS

Periodically, the Army convenes promotion selection boards to consider applicants for the next grade. An officer passed over by two successive boards is released from active duty. Army Reg. 635-100, para. 3-65, See 10 U.S.C. §681 (a) (1976). In 1975, a promotion selection board convened (1975 Board). Jones, a warrant officer in the United States Army Reserve, was not selected for promotion. In February, 1976, another selection board convened (1976 Board). Again, Jones was not selected. Meanwhile, some 1300 officers applied to the Army Board for the

Correction of Military Records (Correction Board) for changes in their record because of defects in the 1975 selection board proceedings. The correction board found adversely for the applicants on some claims, but did find that, contrary to statute, no reserve officers were on the 1975 boards. The Correction Board recommended that new Boards with the appropriate number of reserve officers convene to reconsider all primary zone applicants, using records reconstituted to appear as they had in 1975 and the letter orders of instruction and guidance previously furnished to the original 1975 boards. Following the Corrections Board's recommendation, the Secretary ordered that a reconstituted board (relook board) convene during June, 1976. Although some officers previously not chosen for promotion were selected by the

relook board, Jones was not one of those recommended. Thereafter the Correction Board denied Jones' request to change his records, and on November 10, 1976, Jones received notice that he would be released from active duty. One month before his scheduled release, the court denied his requests for a temporary restraining order and an injunction prohibiting the Army from releasing him from active duty. Jones commenced this action to recover for violation of his statutory and constitutional rights. The Army then released Jones, although he retained his reserve officer commission and received $15,000 readjustment pay. Four months later, the district court granted the Army's Motion for Summary Judgment, and this appeal ensued.

II. JURISDICTION.

A preliminary concern is whether the district court had subject matter juris-

diction. Jones alleged jurisdiction under the Tucker Act, 28 U.S.C. §1346(a) (1976), the Declaratory Judgment Act, 28 U.S.C. §2201 (1976), and the Mandamus Act, 28 U.S.C. §1361 (1976). The Tucker Act grants jurisdiction to the district court for actions against the United States when damages are less than $10,000. Actions for more than that amount must be brought in the Court of Claims. During oral argument, counsel for Jones moved to amend the Complaint to strike the prayer for actual damages, which had not been limited to $10,000. See 28 U.S.C. §653 (1976) (allowing amendment). Counsel for the Secretary raised no objection, and we grant the motion. The Tucker Act is therefore no longer in question because that Act only applies to suits for money damages. Hunsucker v. Phinney, 497 F.2d 29, 36 (5th Cir. 1974), cert. denied,

420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975). The Declaratory Judgment Act is not an independent ground for jurisdiction; it permits the award of declaratory relief only when other bases for jurisdiction are present. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671, 70 S.Ct. 876, 94 L.Ed. 1194 (1950); Seibert v. Baptist, 594 F.2d 423, 428 (5th Cir. 1979); United States ex rel. Weinberger v. Equifax, Inc., 557 F.2d 456, 460 (5th Cir. 1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); Red Lobster Inns of America, Inc. v. New England Oyster House, Inc., 524 F. 2d 968, 969 (5th Cir. 1975). Therefore, the Mandamus Act (Section 1361) is the sole jurisdictional leg upon which this action stands.

In resolving whether section 1361 jurisdiction is present, allegations of

the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction. Carter v. Seamans, 411 F.2d 767, 770 (5th Cir. 1969), cert. denied, 397 U.S. 941, 90 S.Ct. 953, 25 L.Ed.2d 121. The test for jurisdiction is whether mandamus would be an appropriate means of relief. Id. at 773. Three elements must exist before mandamus can issue: (1) The Plaintiff must have a clear right to the relief, (2) the Defendant must have a clear duty to act, and (3) no other adequate remedy must be available. Winningham v. United States Department of Housing and Urban Development, 512 F.2d 617, 620-21 (5th Cir. 1975); Carter v. Seamans, 411 F.2d at 773. Taking the Plaintiff's allegations at face value, we find the court had jurisdiction. This case is similar to Carter v. Seamans, 411 F.2d 767 (5th Cir.

1969), in which this court adopted the district court's opinion and held that section 1361 jurisdiction was available. In Carter, however, the trial court declined to assert its power for fear that its exercise would undermine the jurisdiction of the Court of Claims in the parallel damage action. Id. at 772-76. We need not exercise this discretion, because Jones waives all right to damages and no Court of Claims action exists. Cf. Larsen v. Hoffman, 444 F.Supp. 245 (D.D.C. 1977) (in facts similar to Jones, mandamus jurisdiction declined because of exclusive court of claims jurisdiction). We therefore hold that jurisdiction is present under section 1361, and that it is also now proper to consider Jones's claim for declaratory relief.

III. RELIEF SOUGHT

Before turning to the parties' argu-

ments, we will focus briefly on issues Jones is not raising because they distinguish Jones from other cases on relook boards. Jones doesnot contest the 1976 Board's consideration. Cf. Dilley v. Alexander, 195 U.S.App. D.C.___,___, 603 F.2d 914, 924 (1979) (reversal when 1976 board considered record erroneously including defective 1975 pass over). Jones does not question the relook board's consideration of only those officers in the primary zone. See Dilley v. Alexander, 195 U.S.App. D.C., at ____,____, 603 F.2d at 924-25; Doyle v. United States, 599 F.2d 984 (Ct.Cl. 1979). As noted above, Jones is not requesting money damages.

Jones wishes the court to declare that the 1975 board's actions were void ab initio, to order that the Army alters Jones's records to remove all indication of the 1975 pass over and to order that

the Army reinstate him as if he had not been passed over in 1975.

IV. ARGUMENTS

The litigants' arguments center on whether the 1975 board and the relook board are "selection boards" for pass over purposes. Jones claims the 1975 board was ab initio because no reserve officers sat on the board. He claims this procedural error is irremediable, and that the Secretary's only choice is to allow all applicants not selected by the 1975 Board to continue on active duty until passed over by two other selection boards for there to be a "pass over" within the meaning of the two-pass over rule of the selection out regulation. He argues that the relook board lacks the indicia of a selection board under the regulations, and even if it were a selection board, these boards cannot meet within nine months of

each other. Army Reg. 624-100, para. 36; 635-100, para. 3-65. Therefore, according to Jones, if the relook board is considered a selection board, it is also void because it met in June, only four months after the regular February, 1976, selection board.

The Secretary first asserts that the 1975 board is not totally valid, that use of relook boards is a proper remedy, and that the nine-month regulation is inapplicable because the relook board, in effect, turned the clock back to 1975. Although the Army admits that the composition of the original 1975 Board was improper, it argues that the Secretary has broad remedial powers and properly cured the error here by convening the relook board. The Army also argues by analogy to Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct.

568, 50 L.Ed.2d 471 (1977) that even if the 1975 and relook boards were improperly convened, Jones has the burden of showing that but for the compositional error, he would have been promoted. Even if Jones did meet this burden, the Secretary argues he proved the error was harmless, because when the properly constructed relook board reviewed Jones's record, it also found Jones was not among the "best qualified" for promotion.

V. THE REMEDY WAS PROPER

The 1975 Board was properly constituted because no reserve officers were included in its membership. We cannot agree with Jones, however, that this defect renders the board's actions a nullity, and requires reinstatement until another board reviews his record. To find the 1975 board's actions void ab initio would unduly impinge on the

discretion granted the Secretary to make personnel decisions. See Dilley v. Alexander, 195 U.S.App.D.C. at ___, ____, 603 F.2d at 921-22; Knehans v. Alexander, 184 U.S.App.D.C. 420, 566 F.2d 312 (1977), cert. denied, 435 U.S. 995, 98 S.Ct. 1646, 56 L.Ed.2d 83 (1978). In addition, the 1975 board's actions could not be void for those who were promoted. See Dilley v. Alexander, 195 U.S.App.D.C. at ____, 603 F.2d at 921. The defect in composition, therefore, does not totally invalidate the 1975 Board's actions.

Nevertheless, the lack of reserve members is a conceded violation of the regulation and statute that govern the creation of the 1975 board. The question, then, is what action the Secretary can pursue to remedy this compositional flaw. The Secretary, acting through the Correction Board, has broad discretion "to

correct an error or remove an injustice." 10 U.S.C. §1552(a) (1976). We cannot say the Secretary acted arbitrarily or capriciously in exercising this power and formulating the relook board as a remedy. A relook board, with reserve officers as members, considered the applications of all officers in the primary zone, including those already promoted by the 1975 and 1976 boards. These applications were totally reconstituted to appear as they had in 1975. The relook board used the same criteria in reaching its selection decisions as were used by the 1975 board. This remedy does not appear to be arbitrary and capricious but was an entirely reasonable attempt to mirror the statute's requirements in a fair manner. Counsel debate whether the relook board was an entirely new "selection board" within the meaning of the pass over regulations. Re-

gardless of whether the relook board is considered a promotion board in its own right, it nevertheless was a proper remedy provided by the Secretary to ameliorate the defect in the 1975 board. See Coughlin v. Alexander, 446 F.Supp. 1024 (D.D.C. 1978), aff'd, 191 U.S.App.D.C. 212 589 F.2d 1115 (1979); Fuller v. Alexander, 440 F.Supp. 380, 382 (D.D.C. 1977); Whitehead v. Alexander, 439 F.Supp. 910, 912-13 (D.D.C. 1977). Taken together, the relook board and the 1975 board can properly constitute a "pass over" within the meaning of the regulations.

Because we do not reach the question whether the relook board was a separate promotion board, we need not address Jones's argument that the relook board violated the regulation requiring nine months between successive boards. We will note, however, that one purpose of that

regulation is apparently to allow an officer time to improve his record before his application reaches the second board. Because the relook board considered reconstituted records, with no reference to activities occurring after the 1976 board, the nine-month waiting period regulation appears inapplicable.

Because we uphold the district court's finding that the Secretary did not abuse his power under section 1552, we also need not decide whether the Mount Healthly harmless error principles are applicable. See Johnson v. Reed, No. 77-2570, 609 F.2d 784 (5th Cir. 1980).

VI. CONCLUSION

We uphold the district court and find that despite the defect in the 1975 board, the secretary took proper action to remedy the defect by convening the relook board, and that the nonselection of Jones by the

1975 board, the relook board, and the 1976 board constituted the two pass overs necessary for the Army to release Jones from active duty.

The district court's order entering summary judgment for the Defendant is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Gilbert F. Ganucheau
Clerk

February 14, 1980

TO ALL PARTIES LISTED BELOW:

NO. 77-2337 - Lewis E. Jones -vs-
Clifford Alexander,etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of

Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

BY s/ Claudia Nides
Deputy Clerk

cc: Mr. Charles C. Carter
Mr. Gregory J. Leonard
Mr. L. Neal Ellis, Jr.
Mr. Louis R. Davis, Major

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

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NO. 79-1867

LEWIS E. JONES,

Petitioner

VS.

CLIFFORD ALEXANDER,
SECRETARY OF THE ARMY,

Respondent

SUPPLEMENTAL APPENDIX

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

LEWIS E. JONES,	:	NO. 79-1867
	:	
Petitioner	:	
	:	CIVIL ACTION
vs.	:	
	:	
CLIFFORD ALEXANDER SECRETARY OF THE ARMY,	:	
	:	
Respondent	:	

SUPPLEMENTAL APPENDIX

Petitioner in the above and foregoing matter hereby files his Supplemental Appendix to the Petition for Certiorari previously filed herein. This Supplemental Appendix consists of the Memorandum and Order and the Judgment in the United States District Court for the Middle District of Georgia, which was appealed to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 27th day of May, 1980.

Jerry D. Sanders
Attorney for Petitioner

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

LEWIS E. JONES,)
CIVIL ACTION
Plaintiff)
NO. 77-10-COL
vs.)

CLIFFORD ALEXANDER,)
Secretary of the Army,
)
Defendant
)

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In this case the Plaintiff is an officer in the United States Army Reserve who has been released from active duty as a result of two non-selections for promotion to the next higher temporary grade, his release having been required by the pertinent Army Regulation. When this complaint was filed the Plaintiff moved the Court for preliminary injunc-

tion to stay his imminent release from active duty. On February 1, after a hearing on the matter, the Court denied the Plaintiff's motion for preliminary injunction and the Plaintiff was thereafter released from active duty as above noted. He was not discharged from the Army. He retained his Reserve Officer commission and received readjustment pay in the amount of $15,000.00.

On March 31, 1977, the Defendant filed a motion for summary judgment and a brief in support of the motion. Upon consideration, the Court determines that for all of the reasons urged in the Defendant's motion and the brief filed in support thereof, the Defendant's motion for summary judgment should be and the same is hereby sustained and judgment will be entered accordingly.

ENTERED this 20th day of May, 1977.

s/ J. Robert Elliott
UNITED STATES DISTRICT
JUDGE

I certify that I have mailed
a copy thereon to counsel
of record.
This 20th day of May, 1977.
WALTER F. DOYLE, CLERK
BY: s/ Johnnie L. Adams
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

LEWIS E. JONES,	)CIVIL ACTION
Plaintiff	)NO. 77-10-COL
vs.	)
CLIFFORD ALEXANDER, Secretary of the Army,	)
Defendant	)

J U D G M E N T

The above-entitled matter having come on before the Court upon motion for summary judgment filed by the defendant; and the matter having been submitted and the Court being fully advised in the premises, and the Court having filed its written Memorandum and Order herein,

IT IS ORDERED that the defendant's motion for summary judgment is granted; and the plaintiff's complaint is dis-

missed, the Defendant recover of the Plaintiff its costs of action.

Dated at Columbus, Georgia, this 20th day of May, 1977.

WALTER F. DOYLE, CLERK

BY: s/Johnnie L. Adams

Deputy Clerk

This is to certify that I have this day mailed a copy of this document to all attorneys fo record and to all parties who are not represented by an attorney.

This 20th day of May, 1977.

WALTER F. DOYLE, CLERK

BY: s/ Johnnie L. Adams

Deputy Clerk

Supreme Court, U. S.
FILED
AUG 12 1980
MICHAEL RODAK, JR., CLERK

No. 79-1867

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEWIS E. JONES, PETITIONER

v.

CLIFFORD L. ALEXANDER, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether petitioner was properly released from active duty pursuant to procedures fashioned by the Secretary of the Army to reconstruct the deliberations of Army selection boards that had been improperly constituted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 18-35) is reported at 609 F. 2d 778.[1] The opinion of the district court (Pet. Supp. App. 2-4) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1980. A petition for rehearing was denied on February 14, 1980 (Pet. App. 36-37). The petition for a writ of certiorari was filed on May 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Army officers serving on active duty, both Regular and Reserve, may obtain promotions to temporary rank in the Army of the United States. Periodically, officers are considered for such promotions by Army selection boards based upon thier service record. Congress has provided that these selection boards, when considering the promotion of Reserve officers, must include in their membership an appropriate number of Reserves. 10 U.S.C. 266. Officers eligible to be selected for temporary promotion are separated into two "zones of consideration," a primary zone for more senior officers and a secondary zone for more junior officers. Selection boards are limited as to the total number of officers they may select for promotion and are further limited as to the number of officers who may be selected from the secondary zone. Army regulations provide that a primary zone Reserve officer who is twice passed over for a

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[1] We note that petitioner's reproduction of the court of appeals' opinion, in addition to numerous other errors, omits all seven of the footnotes included in that opinion. Citation to the footnotes will be made to the official report of the opinion.

temporary promotion will be released from active duty. Secondary zone officers who are not selected for promotion, however, are not considered "passed over" for purposes of release from active duty (Pet. App. 20-21; 609 F. 2d at 780 n.2).[2]

Petitioner, a warrant officer in the United States Army Reserve, was considered and passed over for temporary promotion by a selection board convened in 1975 and then again by a board convened in February 1976. The selection boards convened in 1975, however, had been improperly constituted in that they had not contained any Reserve officers as required by 10 U.S.C. 266.[3] Accordingly, some 1,300 primary zone officers, including petitioner, filed applications with the Army Board for the Correction of Military Records (ABCMR) to set aside their passovers by the 1975 promotion boards because of defects in the proceedings of the boards, including their failure to contain Reserve officer membership (Pet. App. 20-21).

Pursuant to the ABCMR's recommendation, the Army convened new boards containing Reserve officers to reconsider all primary zone officers considered by the original 1975 boards. These "Relook Boards" used records reconstituted to appear as they had in 1975 and followed the identical letter orders of instructions and guidance previously furnished to the original 1975 boards. The Relook Boards selected some officers who had been passed over by the original boards, and those officers

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[2]As noted by the court of appeals (609 F. 2d at 780 n.1), the Army's promotion system is "well-detailed" in two other opinions discussing related issues, *Dilley* v. *Alexander*, 603 F. 2d 914 (D.C. Cir. 1979), and *Doyle* v. *United States*, 599 F. 2d 984 (Ct. Cl. 1979), cert. denied, No. 79-1315 (June 2, 1980).

[3]Different selection boards consider different classes of officers. Petitioner was considered by the warrant officer selection board.

were retroactively promoted as if they had been selected by one of the original 1975 boards. Petitioner and other officers, however, were passed over by the Relook Boards as well. The ABCMR held that these officers were not entitled to correction of their records. Thereafter, in November 1976, petitioner was notified that he would be released from active duty (Pet. App. 21-22).

Shortly before his scheduled release date, petitioner brought this action in the United States District Court for the Middle District of Georgia seeking declaratory relief and an injunction barring his release from active duty on the ground that "a passover" by an original 1975 board or by a Relook Board was not a valid basis for release.[4] Petitioner's requests for a temporary restraining order and a preliminary injunction were denied, and he was released from active duty (Pet. App. 22). Subsequently, in a brief memorandum opinion, the district court granted the Army's motion for summary judgment (Pet. Supp. App. 2-4).

The court of appeals affirmed (Pet. App. 18-35). The court rejected petitioner's contention that, in light of the 1975 compositional defect, he could not be released from active duty until he had been passed over by two other regularly scheduled selection boards. It held that the Relook Board procedure was an appropriate method of remedying the defect pursuant to the Secretary's broad remedial powers under 10 U.S.C. 1552 (Pet. App. 31-33). Specifically, the court found that the Relook Board was "an entirely reasonable attempt to mirror the statute's [10 U.S.C. 266] requirements in a fair manner" (*id.* at 32). The court did not decide whether the Relook Board was

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[4]Petitioner also initially sought "actual damages," but later waived any claim to monetary relief (Pet. App. 23).

an entirely new selection board, but simply concluded that "[t]aken together, the relook board and the 1975 board can properly constitute a 'pass over' within the meaning of the regulations" (*id.* at 33).

ARGUMENT

Petitioner contends (Pet. 7-16) that the court of appeals erred in finding that he was properly released from duty and that its decision conflicts with *Dilley* v. *Alexander,* 603 F. 2d 914 (D.C. Cir. 1979). These contentions are without merit.

Although petitioner asserts (Pet. 9-15) that the decisions of the original 1975 selection boards are invalid, he does not suggest why the Relook procedure did not adequately remedy the defect. We submit that, for the reasons stated in its opinion, the court of appeals correctly concluded that the decision of the Relook Board provided a valid basis for petitioner's release from active duty by completely reconstructing the 1975 deliberations before a selection board containing Reserve officers. This decision is consistent with *Doyle* v. *United States,* 599 F. 2d 984 (Ct. Cl. 1979), cert. denied, No. 79-1315 (June 2, 1980), which held on similar facts that the determinations of the Relook Boards provided a valid basis for release from active duty.

Petitioner also contends that "[a]ll points raised in the appeal of Petitioner were raised in the *Dilley* case" (Pet. 7). This statement is completely without foundation. In *Dilley,* a case involving plaintiffs who had also been released from active duty after being passed over for promotion in 1975 and 1976, the court ruled that the Relook Boards were not an adequate remedy for the defect in the 1975 boards for two reasons: (1) the original deliberations were not precisely reconstructed because only primary zone officers were considered by the Relook

Boards and (2) the 1976 selection boards' deliberations were tainted by the decisions of the improperly constituted 1975 boards. 603 F. 2d at 924-925. Neither of these considerations was before the court of appeals in this case. As the court below noted (Pet. App. 27):

> [Petitioner] does not contest the 1976 Board's consideration. Cf. *Dilley* v. *Alexander,* 195 U.S. App. D.C., [332], [342], 603 F. 2d 914, 924 (1979) (reversal when 1976 board considered record erroneously including defective 1975 pass over). [Petitioner] does not question the relook board's consideration of only those officers in the primary zone. See *Dilley* v. *Alexander,* 195 U.S. App. D.C., at [342-343], 603 F. 2d at 924-25; *Doyle* v. *United States,* 599 F. 2d 984 (Ct. Cl. 1979).

Hence, the decision below does not conflict with *Dilley.*[5]

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[5]The *Doyle* case also did not present the two problems that troubled the *Dilley* court. In *Doyle,* the plaintiffs had been passed over originally by the 1974 and 1975 boards, both of which were later reconstituted. And the plaintiffs were held to have waived any objection to the fact that the Relook procedure only included primary zone officers. See 599 F. 2d at 1001 n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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AUGUST 1980

DOJ-1980-08